No. 2513

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

E. CHAS. ELWOOD,
Plaintiff and Appellee,

vs.

JOHN H. MUSTARD, FRED AYER and S. W. TAGGART,
Defendants and Appellants.

APPEAL FROM THE DISTRICT COURT OF ALASKA, SECOND DIVISION, HON. J. R. TUCKER, DISTRICT JUDGE.

Brief of F. M. SAXTON, United States Attorney for the Second Division of Alaska, on behalf of United States as *Amicus Curiae*.

NOME, ALASKA.

Filed this.....day of January, A. D. 1915.

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By.....Deputy Clerk.

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BRIEF OF AMICUS CURIÆ

Comes now F. W. Saxton, United States Attorney for the Second Division of Alaska, on behalf of the United States as *amicus curiae,* and by direction of the Attorney-General of the United States, and the permission of the above entitled court first had and received, files this brief, and requests that John W. Preston, United States Attorney for the Northern District of California, be permitted to make the oral ar-

gument on behalf of the United States at such time as the said cause may be argued orally.

STATEMENT OF THE CASE

This action was instituted by the plaintiff on behalf of himself and a minority of the members of the "Eni", or "Log Cabin Club", for the purpose of testing the right of said club to furnish intoxicating liquors to its members without first having applied for and secured a barroom license to sell intoxicating liquors at retail. The facts are stated in the amended complaint and are admitted by the demurrer thereto. This court overruled the demurrer, and the defendants declining to further plead, rendered judgment and decree in accordance with the prayer of the amended complaint. Defendants have appealed, assigning as error the overruling of their demurrer, and the entering of judgment and decree thereon.

The court's jurisdiction of the subject matter of this action was conceded by all parties to the action in the court below, and assuming that the same will be conceded here, there are but two questions to be considered and decided:

First. Do the transactions complained of constitute SALES of intoxicating liquors; and,

Second. If such transactions do constitute SALES, then do such SALES by said "Eni" club without first having secured a barroom license constitute a violation of Section 2581 of the Compiled Laws of the Territory of Alaska?

We will consider these questions in their order, but will state the first a little more broadly, thus:

AN UNINCORPORATED SOCIAL CLUB ORGANIZED FOR THE ENTERTAINMENT AND PLEASURE OF ITS MEMBERS PURCHASES INTOXICATING LIQUORS WITH THE COMMON FUNDS OF THE CLUB AND DISPENSES THE SAME TO ITS MEMBERS AND GUESTS TO BE DRUNK UPON THE PREMISES, CHARGING THEREFOR A PRICE PER DRINK, OR BOTTLE, FIXED BY THE GOVERNING POWERS OF THE CLUB, IS SUCH A TRANSACTION A SALE WITHIN THE MEANING OF THE LICENSE LAWS OF THE TERRITORY?

The Compiled Laws of Alaska of 1913, provide:

> Section 2571: "That no person, corporation or company shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods in said District of Alaska, any intoxicating liquors, except as hereafter provided. * * * Wherever the term 'intoxicating liquors' is used in this Act, it shall be deemed to include whiskey, brandy, rum, gin, wine, ale, porter, beer, hoochinoo, and all spirituous, vinos, malt, and other fermented or distilled liquors."
>
> Section 2577: "That the liquor licenses authorized and provided by this Act shall be of two classes, namely, wholesale and barroom. * * * That a retail or barroom license shall be required for every hotel, tavern, boat, barroom, *or other place* in which intoxicating liquors are sold at retail * * *. That every place where distilled, malt, or fermented wines, liquors, or cor-

dials *are sold* in quantities as prescribed for retail dealers by Section thirty-two hundred and forty-four of the Revised Statutes of the United States, *to be drunk upon the premises, shall be regarded as a barroom,* and the possession of malt, distilled, fermented, or any other intoxicating liquors with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this Act, and the license therefor shall be known as a barroom license * * *"

Section 2581: "That any one engaging in the sale of intoxicating liquors, as specified in this act, in the District of Alaska, who is required by it to have a license as herein specified, without first having obtained a license to do so as herein provided, or any person who shall engage in such sale in any portion of the District where the sale thereof is prohibited, upon conviction thereof shall be filed * * *"

The Act above set out is so plain and unambiguous that it would appear to come within the class of laws which the courts say "need no interpretation".

There is, however, an irreconcilable conflict of authority in the construction of similar statutes, or rather in the construction of the license laws of the various states as applied to such associations or clubs. Many of the decisions upholding the right of such clubs to dispense liquors to their members without the payment of the license required for retail dealers are based upon the particular wordings of the statutes construed, and one, the Pennsylvania case hereinafter cited, gave serious consideration to the fact that the club had been in existence for many years, a fact well

known to the legislature, and that the legislature had not seen fit to bring it strictly within the terms of the statute. In other words, that the state was estopped, for the reasons stated, from demanding the payment of a retail license by the club. This reasoning does not appeal to other courts which have reviewed this decision, as I shall hereinafter show. But in all of the decisions favorable to the clubs, I think it safe to say that not one is based upon a statute as plain in terms as that of the laws we are now discussing. Even under the statutes in most of the cases mentioned, the decisions appear to be "strained".

It is also worthy of note that in nearly all of the statutes in which decisions have been rendered in favor of the right of clubs and associations to sell liquors or "dispense" them to members without the payment of a license, the statutes have been subsequently amended bringing such clubs specifically within the terms of the statute and made so plain that no court can misconstrue them.

It would serve no useful purpose to review these decisions in detail. In the few cases which do not turn wholly upon the construction of the statutes the argument is made that the dispensing of liquors to the members of such associations does not constitute a "sale" within the meaning of the license laws. That the liquor is the common property of the members, bought with the common funds of the club, and that the dispensing of the same to the members is only a means of distrubting the common property among the owners. In other words, that the individual member

in taking the liquor is only segregating his own property from the common mass, although he pays into the common fund the full value of all he so extracts.

Among the more recent, and which may be called the leading, cases which take this view are:

Tennessee Club v. *Dwyer,* 11 La. 452 (47 Am. R. 298);
State v. *Austin Club,* 89 Tex. 20 (30 L. R. A. 500);
Piedmont Club v. *Com.,* 87 Va. 540;
State ex rel. Bell v. *St. Louis Club,* 125 Mo. 308 (26 L. R. A. 573);
Com. v. *Pomphret,* 137 Mass. 564;
Klein v. *Livingston Club,* 117 Pa. 224 (34 L. R. A. 94);
People v. *Adelphis Club,* 149 N. Y. 5 (31 L. R. A. 510);
Cuzner v. *California Club,* 155 Cal. 303 (20 L. R. A. [N. S.] 1095.

On the other hand, there are many courts that are not impressed with the specious reasoning of the cases cited, and hold as does the Supreme Court of Maryland in *State* v. *Easton Social Club,* 73 Md. 97 (10 L. R. A. 64)

> "that there is no occasion to be astute and to indulge in questionable refinements in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit persons in combination to do what individuals without combination could not do."

Among the cases so holding are:

Army and Navy Club v. *District of Columbia,* 8 Appeals D. C. 544;

People v. *Soule,* 74 Mich. 250 (2 L. R. A. 494);
State v. *Easton Social Club,* 73 Md. 97 (10 L. R. A. 64);
State v. *Mudie,* 22 S. D. 41 (115 N. W. 107);
Martin v. *State,* 59 Ala. 34;
Beauvoir Club v. *State,* 148 Ala. 643 (42 So. 1040);
Marmont v. *State,* 48 Ind. 21;
State v. *Mercer,* 32 Iowa 405;
State v. *Lochyear,* 95 N. C. 633 (59 Am. Rep. 287);
State v. *Horacek,* 41 Kansas 87 (21 Pac. 204);
State v. *Boston Club,* 45 La. Ann. 585 (20 L. R. A. 185);
Mohrman v. *State,* 105 Ga. 709 (43 L. R. A. 398);
State v. *Minn. Club,* 106 Minn. 515 (20 L. R. A. [N. S.] 1101;
Spokane v. *Banghman,* 54 Wash. 315 (103 P. 14);
State v. *Kline,* 50 Ore. 426;
South Shore Country Club v. *People,* 228 Ill. 75 (12 L. R. A. [N. S.] 519);
People v. *Law and Order Club,* 203 Ill. 127 (62 L. R. A. 884);
Manning v. *Canyon City,* 45 Colo. 571 (101 Pac. 978);
Ada County v. *Boise Commercial Club,* 118 Pac. 1086);
State v. *Neis* (N. C.), 12 L. R. A. 412;
In re Cutting (Calif.), 121 Pac. 304, 305, par. 1.

The courts seem to be unanimous in holding that when clubs are organized for the purpose of evading the license laws, or against the provision of the local option laws, and dispense liquors, purchased with the common funds, to the members at a fixed price per

drink or bottle, such a transaction constitutes a "sale" within the meaning of these laws. See cases cited in note to *South Shore Country Club* v. *People,* 12 L. R. A. [N. S.] 519.

We confess that we are unable to follow the reasonings of those courts that hold that the same transaction constitutes a "sale" or does not constitute a "sale", depending upon the purpose for which the club exists, or whether a license law is being construed, or a local option law which prohibits any *sale* within a prescribed territory; the question being in each case what acts constitute a "sale", not what the purpose and design of the "sale" may be.

The above cited case, *South Shore Country Club* v. *People,* 12 L. R. A. (N. S.) 519, was very carefully considered by the Supreme Court of Illinois. The defendant club was a corporation, not for pecuniary profit, but for the pleasure and social recreation of its members—one of the usual high class clubs found in the cities. The sale of the liquors to its members was purely incidental to the objects and purposes of the club, the same as the furnishing of meals, etc., but the members were charged for liquors the same as for meals "and for the service of caddies, boatmen and teachers and for horses, golf supplies, and special services". The club held a United States retail liquor dealer's license, but the plea averred that it was secured "inadvisedly and was not necessary".

The Court, speaking through Mr. Justice Cartwright, says:

"The right to engage in the business of selling intoxicating liquors by retail is not now a common right, and can be exercised only in the manner and upon the terms which the statute prescribes. *People ex rel. Morrison* v. *Creiger,* 138 Ill. 401, 28 N. E. 812. The statute provides for licensing such sales, and makes a sale without a license a criminal offense. It provides that whoever, not having a license to keep a dramshop, shall sell any intoxicating liquor in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, shall be punished by fine, or imprisonment, or both; and, if appellant has been guilty of a misuse of its corporate power by making sales of liquor to be drunk upon its premises, the judgment of the superior court must be affirmed. The only question to be determined is whether the furnishing and delivery of intoxicating liquors by appellant to its own members, to be drunk upon the premises, and which are paid for by the individual members to whom the same are furnished and delivered, constitute a sale. Counsel for appellant admits that the letter of the statute requires any and every one, without exception, who sells intoxicating liquors in any less quantity than one gallon, or in any quantity, to be drunk upon the premises, to take out a license to do so; and he fully appreciates that the definition of a dramshop adopted by the legislature is broad enough to include any place where intoxicating liquors are retailed in less quantity than one gallon; but he says that appellant contests the right to demand a license because it refuses to have its clubhouse considered a dramshop, or to be regarded as a dramshop keeper. The argument is that the court should not take the language of the statute literally, and that the general intent and spirit of the act do not require that it should be so taken. A dramshop, as defined by the statute, is a place where spiritous, or vinous, or malt liquors are retailed by less quan-

tity than one gallon; and it is true that the term has, in popular acceptation, a more restricted meaning. It is commonly used to designate a place where intoxicating liquor is sold at a public bar frequented by the public without restriction, and, if the legislature had failed to define what was intended by the term 'dramshop', it would be reasonable to presume that it was used in the ordinary and popular sense; but, of course, the legislature had a right to define what was meant by the term as used in the act, and the courts are bound by the definition. The argument of the appellant is the same as that of the druggist, Wright, who felt himself aggrieved that his drug store should be brought within the definition of a dramshop by the sale in good faith of liquor for purely medical purposes. His chief business was the sale of drugs and medicines, and he did not even sell intoxicating liquor as a beverage, as the appellant does. The court put in the background the popular idea of the dramshop, saying that undue importance was given to that term, and enforced the law to its literal meaning. The court said: 'The only safe course is to enforce the law as the legislature has made it, and not defeat its execution upon some hypothetical theory of public policy that finds no place or recognition in the act itself.' *Wright* v. *People,* 101 Ill. 126. Appellants clubhouse would not be no more or less a dramshop with the license than without it, and, if the facts bring it within the definition adopted by the legislature, it must be held to be a dramshop, whether the definition accords with the popular understanding or not."

The Court then takes up two of the cases above cited, holding to the contrary, to wit: *Klein* v. *Livingston Club,* 177 Pa. 224, and *State* v. *St. Louis Club,* 125 Mo. 308, and, after stating what was considered and decided in these cases, says:

"It is undoubtedly equitable, as said in the Pennsylvania case, that the members of a club who drink the liquor should pay for it, and that those who do not touch it should not pay anything; but we do not see how it can be said that the transaction is merely an equitable distribution between the members of property belonging to them in equal shares. The liquor belongs to the corporation as a legal entity, and no member owns any share of the liquor, as a tenant in common with the other members or otherwise. An association organized merely for social, literary, scientific, or political purposes, although not incorporated, is not a partnership. 25 Am. & Eng. Enc. Law, 2d ed., p. 1137. A member of such association has no individual right or interest in the property, and owns no proportionate share of it, but only has a right to the joint use so long as he continues to be a member. Even if they were tenants in common, a transfer of a specific part of the property to one for a stipulated price would be a sale. Appellant, howover, is incorporated, and its stockholders are not tenants in common of its property; but the title is in the corporation. The right of a stockholder is to participate, according to the amount of his stock, in the profits, and, upon the dissolution of the corporation, to share in the assets remaining after the payment of the debts. If a member should clandestinely enter the clubhouse and withdraw from what is called the 'common property', as much of the liquor as would be represented by his interest as a member, it would hardly be considered that the act would not be larceny. The arguments presented to show that the dispensing of liquors for fixed prices paid by the members is not a sale, if applied to the case supposed or any other conceivable transaction, would certainly be unique. We agree with the views expressed in *State* v. *Easton Social, Literary & Musical*

Club, 73 Md. 97, 10 L. R. A. 64. 20 Atl. 783, that there is no occasion to be astute, and indulge in questionable refinements, in order to relieve these corporations of the just consequences of their acts, or to endeavor by artificial or fictitious reasonings to permit these persons in combination to do what individuals without combination could not do.

"The fact that there is not profit in a sale does not deprive the transaction of its character as a sale, and surely it makes no difference that the sale of the liquor is only incidental to the main purpose of the club. *Mohrman* v. *State,* 105 Ga. 709, 43 L. R. A. 398, 70 Am. St. Rep. 74, 32 S. E. 143. The sale of liquor is but an incident to the business of a drugstore or restaurant. It is certainly but a trifling incident to the business of a large hotel. The business is carried on in department stores, where it is but a minor and incidental branch of the whole business. *Chicago* v. *Netcher,* 183 Ill. 104, 48 L. R. A. 261, 75 Am. St. Rep. 93, 55 N. E. 707. It is immaterial whether the main purpose of a corporation is social pleasure or making money by the sale of merchandise, if intoxicating liquor is sold at retail as an incident of the main purpose or otherwise; and neither is the fact that the public generally are not admitted.

"We are convinced that the former decision of the question here involved was correct, and the judgment of the Superior Court is affirmed."

In *Martin* v. *State,* 59 Ala. 34, and *State* v. *Neis,* 108 N. C. 787 (12 L. R. A. 412), it was held that the *employee* of a social club, who, without a license, dispenses intoxicating liquors, was guilty of selling without a license, although the liquor had been purchased with the funds of the club, and was sold only to the members of the club, and the money received therefor

was deposited in a common fund, and was spent only to replenish the stock of liquors for the use of the club.

And the club itself, upon such a state of facts, was held liable to the penalty for selling liquors by retail without a license, in *State* v. *Essex Club,* 53 N. J. L. 99 (20 Atl. 769).

In *Mohrman* v. *State,* 105 Ga. 709 (43 L. R. A. 398) it was held that the mere fact that the selling and drinking of intoxicating liquors was only an incident, and not the main object, of the incorporation of a social club, would make the place where such liquors were dispensed to and drunk by members only, none the less a tippling house, within the meaning of the statute making penal the keeping open of such a house on the Sabbath day.

In *People* v. *Soule,* 74 Mich. 250, it was held that a club properly organized in good faith could not purchase liquors by the quantity and distribute them among its members receiving pay therefor as they were distributed by the glass, the proceeds to go into the treasury of the club to be used in purchasing other liquors, or in paying expenses, without being able to pay a retail tax for selling such liquors; it being clear that the statute regulating the sale of intoxicating liquors *was not aimed at saloons or public bars alone,* because it expressly provided that retail dealers "shall be held and deemed to include all persons who sell any of such liquors by the drink", and further provided that "all saloons, restaurants, bars in taverns or elsewhere, and all other places, except drug stores,

where any of the liquors mentioned in this Act are sold or kept for sale either at wholesale, or retail, shall be closed on the first day of the week".

Another well considered recent case is that of *Manning* v. *Canyon City,* 101 Pac. 978 (Supreme Court of Colorado). The defendants constitute a board of control of the Elks club of Canyon City. They were found guilty in the lower court of the violation of an ordinance reading as follows:

> "Whosoever by himself or another either as principal, clerk, agent, or servant, shall sell or dispose of, or shall give away for the purpose of avoiding any of the provisions of this ordinance, any intoxicating, spirituous, malt, vinous, fermented or mixed liquors within the corporate limits of this city, or within one mile beyond the outer boundaries thereof, shall be fined not less than one hundred ($100) dollars, nor more than three hundred ($300) dollars for each offense; provided that this ordinance shall not apply to regularly licensed druggists, who may have a permit from the city council to sell such liquors, when sold in accordance with said permit."

In the opinion Mr. Chief Justice Steele, speaking for the Court, says:

> "The club is a part of and under the control of the Canyon City Lodge of the Benevolent Protective Order of Elks of the United States of America. The membership of the order is in excess of a quarter of a million of persons, and it, through the subordinate lodges maintain clubs in many of the towns and cities of the country, and there are clubs of the order maintained in most of the important cities and towns of this state. This club is a *bona fide* club, and, as found by the

court below, is composed of about four hundred substantial and respectable citizens of Canyon City. It is maintained for the entertainment, pleasure and benefit of the members of the order, and any member of the order, whether a resident of Canyon City or elsewhere, is entitled to the privileges of the club. The club is supplied with newspapers, magazines, and such reading matter as the management may deem advantageous or desirable for the members. It maintains billiard, pool, and card tables. Food and liquors are dispensed to such of the members as may desire them. In short, it is a social club, like any other social club to be found in the large towns and cities of the country; the dispensing of liquors being a mere incident to, and not the object of, the organization. It is an unincorporated association. No visitor or guest of a member is permitted to spend money in the club, but the member introducing the visitor or guest is responsible for his guest's entertainment. The club keeps on hand a supply of the various kinds of intoxicating liquors, which it dispenses to its members and guests, and the members of the order at the rate fixed by the board of control. Those to whom liquors are supplied may pay cash or have the amount charged. The amount received from the members for the liquor goes to replenishing the supply of liquors and defraying the expenses of the club."

* * * * * * *

"It is contended by counsel for the defendants that the process by which the members of the club obtain the title to a quantity of liquor, to be disposed of by the individual as he may desire, is not a "sale", but a mere distribution of the liquor of the club among its members. On the other hand, it is contended by the city that such process is a sale and is within the prohibition of the ordinance, and upon a determination of these propo-

sitions the whole controversy depends. If such disposing of liquors constitutes a sale, then the defendants were legally convicted, and the judgment should stand; otherwise the judgments should be reversed and the defendants discharged."

"The decisions are in irreconcilable conflict. In the decisions where courts hold that clubs are exempted from the license laws, it is generally because of some peculiar word or phrase contained in the statute, and it should be noted that no case is presented where a prohibition statute has been construed as exempting social clubs from its operations. In the case of *State* v. *Kline,* 50 Ore. 426, 93 Pac. 237, decided in 1907, and the latest case we have seen on the subject, Mr. Justice Moore, in the course of the opinion said: 'In the note to the case of *Barden* v. *Montana Club,* 24 Am. St. Rep. 27, immediately following the excerpt hereinbefore quoted, the editors of that valuable series of case laws makes the following observation as deducible from an examination of adjudications applicable to the inquiry, to wit: "The question whether or not the furnishing of intoxicating or fermented liquor by a club to its members in the manner above stated constitutes a sale in violation of laws prohibiting sales or whether or not it constitutes a sale within the meaning of a law requiring a license before one can engage in retailing such liquor, has been the subject of various and conflicting decisions by a number of the appellate courts of the country. While the cases can not be reconciled, the current as well as the weight of authority is undoubtedly in favor of the rule that the distribution and consumption of liquors in a club by its members in the manner above stated is a sale and a violation of the laws of the nature stated.' Several cases are cited and quotations therefrom are contained in the notes that fully sustain the conclusions thus

reached, and we adopt that part of such deduction as relates to the disposal of intoxicating liquor by a club to its members in violation of the provisions of a local option law, without further calling attention to the cases relied on."

The court then discussed a number of opinions hereinbefore cited, and continues:

"Supporting the doctrine announced in the foregoing decisions are the decisions of the Supreme Court of Alabama, Kansas, Kentucky, North Carolina, Mississippi, Indiana, Michigan, Georgia, West Virginia and Louisiana; and whenever the question has been presented to a federal court, that court has held the clubs liable as retailers to pay the government tax. Not only is the greater weight of authority, but, in our opinion, the better reason, on the side of those courts that hold the transaction between the club and its members, such as we have described herein, to be an ordinary sale." (Citing cases.)

"There are many authorities supporting the view that the transaction by which a member of a club acquires a quantity of liquor for its own use upon the payment of a stipulated price is not a sale. It is so held in Missouri, by the Supreme Court, in *State* v. *St. Louis Club,* 125 Mo. 308, 28 S. W. 604, 26 L. R. A. 573; but Judge Philips, then District Judge for the Western District of Missouri, held in the case of *United States* v. *Giller* (C. C.), 54 Fed. 656, that social clubs where liquor was dispensed were retail dealers and were required to pay the government tax, and in a case decided by the St. Louis Court of Appeals (*State* v. *Bacon Club,* 44 Mo. App. 86) it was held that such a transaction is a sale within the prohibition of the statute of the state. The opinion closed with this significant sentence: 'The principle of law that prohibits a laboring man

from buying a drink of liquor in a saloon ought to prevent wealthy gentlemen from organizing themselves into corporations for the purpose of selling it to their members.'

"In Massachusetts the Supreme Court held that the distribution of liquor to the members of a club, by a transaction similar to the one before us, is not a sale. *Com'rs* v. *Smith,* 102 Mass. 144. But the Federal court of Massachusetts held that such transactions were sales, and the clubs were liable for the violation of the federal laws as retail dealers. *United States* v. *Wittig,* 28 Fed. Cas. 744."

"The Pennsylvania Supreme Court holds, in *Klein* v. *Livingston,* 177 Pa. 224, 35 Atl. 606, 34 L. R. A. 94, 55 Am. St. Rep. 717, that, where an incorporated social club is organized and conducted in good faith, owning its property in common, to which the furnishing of liquor to its members is merely incidental to the purpose for which it was organized, the furnishing of liquors does not constitute a sale; but the federal courts of Pennsylvania hold that such dealing with members of clubs does constitute a sale, and requires the clubs to pay the government tax as retail liquor dealers. *United States* v. *Alexis Club* (D. C.), 98 Fed. 725. The facts in the Federal case were about as they are here, and Judge McPherson in his opinion says, among other things: 'Did the defendant, then, sell liquor to its members? I shall not review the irreconcilable cases upon this subject, nor make the superfluous attempt to produce a new argument in support of my conclusion. I content myself with saying briefly, that I agree with the general opinion of the community, and hold the transaction to be a simple, ordinary sale. If a chartered club, such as the defendant, buys liquor, the legal title to this property is in the corporation, and not in the members. * * * The legal title then being

in the corporation, it is further to be observed that, when the title passes to a consumer, it passes by a transaction that exhibits every element of a sale, and shows no outward sign of being anything else. The intending consumer asks to be served with a definite quantity of intoxicating drink. The owner of the legal title of the liquor, acting by a paid servant, agrees to the request, requires the price to be paid in cash, or accepts the consumer's promise to pay in the future, and thereupon delivers the subject of the bargain. Nothing else takes place, and, if this is not a sale, but is really a partial distribution of the common stock, the truth is so veiled that the participants in the transaction, I venture to assert, rarely suspect that they are taking part in anything but a commonplace sale. It is safe to say that—except, perhaps, among those lawyers that may be familiar with the discussion upon the subject—to order and receive liquor at a club is always regarded as a sale, and I see no sufficient reason for declining to accept the popular estimate of an act so generally known and so easily comprehended. * * * I may, perhaps, be permitted to add a single word in conclusion. If the result that I have reached is correct I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society than which there is none more vital. Privilege and privileged classes are, and ought to be, intolerable; and it comes irritatingly near to a privilege when social clubs, offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquor among their members, while the robust sense of the community, not excluding the club members themselves, knew the transaction to be a sale.' "

"There are other authorities which sustain counsel in their contention that the transaction of the club in dispensing liquor is not a sale, but we are able to distinguish the act of the club in dispersing of its liquors to its members and any other process by which the title to intoxicating liquors is passed from one person to another by delivery and payment. In many of the cases cited the liquor disposed of in the clubs was the property of a corporation, and the courts held that, as the legal title to the liquor was in the corporation, and not in the individual members, the transfer by the corporation to the members constituted a sale, and the council attempts to distinguish between the case at bar and those cases."

"When one becomes a member of the Elk's Club he places his interest in the club property in the hands of a board of control, and he has a joint interest in the club property so long as he remains a member, subject to the right of the board of control to dispose of it as provided by the by-laws. The testimony shows that the Elk's Club, through its board of control, or a servant thereof, delivers to the members on demand such quantity of liquor as he may desire, for such price as has been fixed by the board, to be paid for in cash or to be charged to the member's account. The liquor thus delivered may be consumed by the member, or may be given away, or may be destroyed. The money that is received is used to replenish the treasury of the club and in buying other liquors or supplies. The member, assuming that he has an interest in it, has but a minute interest, and when he exchanges his money for a quantity of liquor, he pays for his minute interest and the interest of each of the other members. But it is doubtful if he has any interest which he may take by this method of distribution."

"By becoming a member of a society or club

a person acquires, not a severable right to any of its property, but merely a right to its joint use and enjoyment so long as he continues to be a member, which right ceases upon his withdrawal or expulsion from the society. The right of membership invests him with no individual transmissible interest in the property and effects of the association, and neither he nor any member less than the whole can dispose of such property, or any supposed proportionate part or interest therein.'" Am. & Eng. Ency. of Law (2d Ed.), Vol. 25, p. 1135.

"But when the members of a club clothe the board of control with the authority to dispose of liquor belonging to the club, they relinquish their right to have the entire property of the club remain intact for joint use, occupancy and enjoyment of all the members, and make such board their agent to dispose of the liquor, and, in our opinion, such disposal by the board is a sale pure and simple. The transaction appears to contain all the elements of a sale. Such transaction is but a contract between the parties to give and to pass rights of property for money which the buyer pays, or promises to pay, to the seller for the thing bought and sold; and it would require, to paraphrase the remarks of Judge McPherson, a refined reasoning to declare that the club is doing no more than distributing a common stock of liquor among its members, while the robust sense of the community, not excluding the members themselves, know the transaction to be a sale."

"Under the by-laws of the club, any of the several hundred thousand members of the order of Elks in the United States, is entitled to all the privileges of the club, and it is not seriously contended that under a by-law such as this the delivery of liquor for pay does not constitute a sale; but we have determined not to base our judgment upon such fact alone. Owing to the great number

> of social clubs in the state whose status concerning the disposition of intoxicating liquor should be determined, we have concluded to rest our opinion on the broader ground and settle the controversy."

One of the latest cases which we have been able to find on this subject is *Ada County* v. *Boise Commercial Club,* decided by the Supreme Court of Idaho, November 1, 1911, and reported in 118 Pac. at page 1086 *et seq.* This was an action by the county of Ada against the Boise Commercial Club to collect a license for the sale of liquors. The case was submitted on an agreed statement of facts. The defendant was a corporation organized under the laws relating to religious, social and benevolent corporations, had no capital stock and was not conducted for pecuniary profits. The main purpose of the club was the same as that of other commercial clubs—to advance the commercial interest of the city and state. In the opinion the Court says:

> "This appeal involves the construction and application of section 1506, Rev. Codes. This section reads as follows: 'It shall be unlawful for any person, by himself, by agent or otherwise, to sell spirituous, malt or fermented liquors or wines, to be drunk in, or about the premises where sold without having first procured a license and given a bond. * * *' This section became the law of this state on the first day of July, 1891. Council for appellant makes two different contentions against the application of this statute to the facts of this case: First, that it was not the intention of the Legislature to make the word 'person' as used in section 1506, include

clubs of the kind and character described in the agreed statement of facts. We think the statutes of this state answer this objection."

(1) "Section 15 of the Revised Codes provides: 'Words and phrases are construed according to the content and the approved usage of the language, but technical words and phrases, and such others as have acquired a peculiar and appropriate meaning in law, or are defined in the succeeding section, are to be construed according to such peculiar and appropriate meaning or definition."

(2) "Section 16, Rev. Codes, among other things, provides: 'The word person includes a corporation as well as a natural person.' This latter section of the statute became a law while Idaho was still a territory, and has been continued as a part of the laws of Idaho since its statehood, and the definition of the word 'person' has never been changed or altered or questioned by the Legislature in any subsequent legislation, and the definition given in the statute has been accepted as the true and correct definition, and such has been the usage of the term 'person' since the adoption of such statute; and in construing the same we are admonished by section 15, *supra,* that words and phrases are construed according to the context and the approved usage of the language, and we think that the accepted usage of the term 'person' has been and is that it includes a corporation as well as a natural person."

(3) "It is, however, urged by counsel for appellant that, inasmuch as the Legislature fails to include the term 'incorporated club' in the provision of section 1506, therefore the Legislature did not intend to include such club within the provision of said section. It was unnecessary to classify the kinds or character of corporations which would be required to secure a license to sell intoxicating liquors to be drunk on the prem-

ises, unless the Legislature had in mind the exclusion of a particular kind or character of corporation from the operation of the statute, because it had been previously enacted and had long been a law when section 1506 was enacted and the word 'person' included all corporations, and we think the conclusion is inevitable that, if the Legislature intended to exclude any particular kind of corporation, they would have so declared in the section. Therefore, when the Legislature said 'any person' they intended that the word should mean the same as defined by the Code, and should include corporations, and, if so, if clubs are corporations, the word 'person' includes such corporations."

The court further says:

"The second question urged upon this appeal is: Are the transactions with reference to the distribution of intoxicating liquors as set out in the agreed statement of facts sales? It must be conceded at the inception of a discussion of this question that the courts are very much divided. This conflict of views has arisen out of two different causes, the first the language used in the statutes of the various states requiring a license; the second, an apparent notion that there are good clubs and bad clubs, and that the clubs which are good are not exclusively engaged in the business of selling intoxicating liquors are, or ought to be, exempt from the statute requiring a license, while all other clubs must procure a license. Under the facts in this case the Boise Commercial Club is a corporation organized as a club and it is agreed: 'That ever since the organization of this club it has maintained in connection with its buffet a stock of vinous, spirituous and malt liquors and cigars in quantities sufficient to fulfill the wants of its members and their guests. That these liquors and cigars are purchased by

the club at wholesale prices and supplied to members and their guests exclusively, without pecuniary profit to the club, in small quantities or individual drinks, to be consumed by such member and guests within the clubrooms. That the amount paid by such member for such drink is in excess of its original cost to the club, but the amount of this charge is regulated to cover the actual cost to the club of the liquor and cigars and expense of serving the same and conducting the buffet. On being served the member signs a card which is thereafter filed by the servant of the club in the office of the secretary, and is paid by the member before leaving the clubroom or charged to his account.' While it is true the furnishing of such liquors is merely incidental to the main objects and purposes of the club, still that fact in no way lessens the transaction. The club purchases and keeps in stock the liquors, and furnishes the same to the members and their guests, and a charge is made therefor in excess of the cost of such liquor to the club. It thus appears from this statement that the liquors are the property of the club."

(Citing cases.)

"The club being a corporation, under our statutes the stockholders and members thereof bear the same relation to the club as stockholders in any regular corporation organized under the statute, and the property purchased by the club and dispensed to its members is a disposition on the part of the club, to the members, of such property, and the members secure the possession of the liquor by paying the club a certain price. An examination of this statute discloses the fact that the 'person' making the sale is not limited to a person engaged in the business of selling liquor, or a person engaged in conducting a saloon or a disorderly place of business, or that the selling of liquor shall be the principal business conduct-

ed, and not a mere incident to aid the principal business, but does require that all persons who sell, whether the sale be an incident of the principal business, or be made at a profit or a loss, shall procure a license before the sale is made."

"Had the legislature intended to make any exception of the extent of the sale or the place where or the manner of the sale, or the place where the liquor is sold, or whether the sale was at a profit, or whether it was made simply to aid a general business carried on, it no doubt would have made some provision in the statute for such exception. The fact that the sales made by the club are merely incidents of the general purpose and objects of the club, and are not made for profit, does not relieve the club from the obligations of the statute, because if they were true, then there is no reason why a grocery store, or a drygoods store, or a blacksmith shop might not keep a stock of liquor on hand and sell the same as a mere incident to the business carried on by such person, and as a means of inducement to persons to patronize the particular place. So might the entire populace organize itself into various corporations or organizations or clubs for the purpose of carrying on or promoting some particular business or enterprise, and, as an incident to the main business, keep a stock of intoxicating liquors on hand and furnish the same to the members or patrons, even at a loss, and thereby increase their patronage so that the increase in trade would be the profit, and thus the statute be entirely evaded. It is no doubt true that when the Commercial Club it attached as a part of the business of the club the sale and disposition of intoxicating liquors as an inducement to persons to become members of the club in order that they might have the accommodations furnished at the bar of the club, and the club may have benefited and profited by the fact that its membership was in-

creased by reason of this special inducement, although the direct profits of the sale of the liquor was a matter of little consequence and of little profit. Section 1506 of the statute, however, makes no such exception, and there is no other provision of the statute which seems to make any such exception."

"But it is contended that there was no sale made by the club of intoxicating liquors. The stipulation of fact says that the club purchased intoxicating liquor and supplied it to members and their guests, and that the amount paid by the members for such drinks was in excess of the original cost to the club. Was this a sale within the meaning of the statute? There is no definition given by the statute of the word 'sale' as used generally throughout the Code, but we are admonished by the provisions of section 15 of the Code that 'words' and phrases are construed according to the context and the approved usage of the language, and the word 'sale' as used in said section is a word that has been well defined in its meaning by the courts and text writers, and is also a word of approved usage. As generally used 'sale' means the transfer of title by valid agreement from one party to another for some consideration." 1 Mecham on Sales, Sec. 1; 1 Benjamin on Sales, p. 1; Black's Law Dictionary, p. 1053.

"In the case of *State* v. *Kline,* 50 Ore. 426, 93 Pac. 241, in defining the word 'sale' used in a statute which prohibited any person within the prescribed bounds of a prohibition district to sell any intoxicating liquors whatsoever, and that such person should be subject to prosecution, the court says: 'It would seem from an inspection of the language last quoted, that the section was framed with an intent to prevent the disposal of intoxicating liquors by a non incorporated social club to its members within prohibition territory, even

> if it were determined that the transfer of the special property in the liquor by an agent of the organization to a member thereof constituted only a gift. Where, however, as is assumed in the case at bar intoxicating liquors are purchased by an incorporated society, to be used as is hereinbefore detailed, it would appear that the corporation is the owner of the liquors, and, when they are dispensed to a member with the intent to pass the title in the goods, the act constitutes a 'sale'. In that case the Court had under consideration the liability of an agent of a corporation organized for the same general purpose as the appellant in this case."

The court then discussed the Colorado case above cited and the opinion of Judge McPherson, in *United States* v. *Alexis Club,* 98 Fed. 725, and says:

> "We think this statement of the Federal Court is correct and clear, and that little can be added to what is there said. We think, however, we might supplement the language of that court by saying that we do not believe that the opinion is generally entertained by members of any social club incorporated under the laws of a state, which sells intoxicating liquors, and a charge is made therefor, that the transaction is anything else than a sale. The member makes the purchase in the same manner and pays the same price for the article purchased as he would at the common bar of a saloon, and the transaction is carried on in the same manner as a transaction involving the purchase of a pound of sugar or a can of coffee in a grocery store. He never considers or recognizes that the article purchased is his property, but does recognize that the property is the property of the club, and that he is paying for a distribution of property belonging to himself, but does recognize that the property is the property

of the club, and that he is paying for the same in the same manner as he would pay for any article purchased of a mercantile company engaged in that line of business. In the case of *City of Spokane* v. *Baughman,* 54 Wash. 315, 103 Pac. 14, the Supreme Court of the state of Washington had under discussion the question of the sale of intoxicating liquor at the Spokane Club, organized for the same general purpose and having the same objects as the appellant club, and says: 'Among other accommodations furnished by the Spokane Club for the use of its members and their guests * * * it has maintained a room in the club quarters, with one of the regular club employees in charge, where cigars, liquors, wines, beers, and mineral waters are furnished, at charges from time to time fixed by the board of managers of the club. No money is received by the attendant for the goods so furnished, but slips are signed by the members, showing the character of the goods furnished and the cost thereof. These slips are turned in by the attendant to the bookkeeper of the club, and are charged to the account of the member, and in due course are paid by him.' The language of the ordinance which was alleged to have been violated provides: 'If any person shall, within the limit of the City of Spokane Falls, sell, dispose of', etc. And the Court says: 'When the liquor is bought through the regularly constituted agent of the corporation, it undoubtedly belongs to the corporation, the title as well as the possession, being in the corporation, and it remains there until it is transferred to the buyer for a consideration. Then it becomes the property of the purchaser, and it is at his absolute disposal. He can drink it himself, give it to his guest, or throw it away. The corporation has no further interest in it. In other words, it has been paid for, and the transaction, it seems to us, involves all the elements of a sale."

After discussing a number of the cases above cited the court adds:

> "While there are many other authorities supporting the rule announced in the cases cited and considered above, yet we deem it unnecessary to go into a further discussion of those cases. We think the weight of authority is with the proposition that where a statute in positive terms prohibits the sale of intoxicating liquors to be drunk upon the premises where sold, without first procuring a license, and no exceptions are made excluding clubs organized as corporations, and such corporations are persons under the statute, then all sales made by a person or corporation of whatsoever character, where no license has been procured, come within the provisions of Rev. Codes, Section 1506."

In discussing a California case which gave weight to the fact that the statute or ordinance under which the prosecution was conducted did not specifically name social clubs, the court says:

> "The objection is very easily answered by saying that if the city of Los Angeles, or any other city, was intended to be excluded from the operation of an ordinance or statute which absolutely prohibits the sale of intoxicating liquors without a license, it is a very simple matter for the city or Legislature to so provide by language that clearly shows such an intent. We can not agree with the California court or the cases which follows its reasoning. To our mind these cases announcing such a rule have attempted to lay down principles which would shield and protect certain classes selling intoxicating liquors in violation of a statute."

The court then discussed in detail the cases, holding that such transactions do not constitute sales, explaining or criticising the same, and continues:

"Section 1506, does not require a license only from those engaged in the business or occupation of selling liquors, but it is made unlawful for any person to sell, whether such person be engaged in the business of selling or not. The person making the sale is not required to be engaged in that particular business. If it is a sale, then a license must be procured under the provisions of the statute, and the Texas case holds such is a sale if it be in a territory where the sale is prohibited. In this state the sale is prohibited where a license is not obtained, and a sale without license is in territory where a sale is prohibited without the same.

"Many other cases are cited by counsel for appellant which hold that a club organized for social purposes, such as the Boise Commercial Club, where intoxicating liquors are purchased by the club and dispensed to members, and such disposition of the intoxicating liquors is merely incident to the main objects and purposes of the club, is not subject to revenue license laws, and although the statute makes no mention of the club as being exempt from the provision of the revenue laws, yet the courts will say that sales made by such clubs are merely a distribution of the property of the club to the members to whom it rightly belongs, and that, therefore, there is no sale. We can not agree with this line of decisions. In our judgment every single opinion which holds as above indicated, partakes of a disposition and effort on the part of the court to shield the clubs and remove them from the operation of the statutes solely because they are social in character, and composed of men who are inclined to promote commercial interests and

business opportunities and social gatherings. To our mind that theory of the application of the law results in a class distinction which is unreasonable and dangerous, and not justified by legislative enactments or common-sense application."

"It is also argued on behalf of the appellant that the appellant club has not been called upon to procure a license under the provisions of Section 1506 of the Revised Codes since the organization, until a short time before the stipulation of facts was entered into, and that the appellant club was never required by the county or its officials, nor by any state official to take out a license under said section, and that such demand has never been made upon any *bona fide* social club or corporation throughout the state—although such clubs and corporations have been in existence and in operation in Ada county and other parts of the state for more than fifteen years, and had furnished and supplied intoxicating liquors in the manner adopted by the appellant club; and because of this policy in carrying out the laws of the state it is claimed that the legislative intent in enacting section 1506 is shown, and that such clubs were not intended to be within the provisions of said section. After section 1506 was enacted, as a law of the state, and in plain, clear and positive language prohibited the sale of intoxicating liquors to be drunk on the premises where sold without a license, it was the duty of the proper officer in each county to enforce the law, and collect the revenue provided for in the statute from all persons making sales of liquors in violation of the law, and the mere fact that such officers have failed to perform their duty will not control this court in giving effect to the plain language of the statute. It is an elementary principle that the neglect or failure of public officers to do and perform their duties as required by law will not estop the public

or prevent any rights or acts of the state in enforcing such laws, and we are not inclined to announce as a legal proposition that the failure of the public officials to collect a revenue license where such is required for a number of years will be evidence of the intent of the legislative body in passing such law to exclude from the operation of such statute persons and corporations from whom such officers have failed to collect such revenue license."

"We have most carefully gone through and examined the cases cited by both sides in this case, and are thoroughly convinced that under the provisions of section 1506 the question is not in doubt; that the section was intended by the Legislature to prohibit all persons of every kind, nature and description, including corporations of all kinds and natures, from selling intoxicating liquors to be drunk on the premises without first procuring a license and that good reasoning and common sense makes such a statute applicable and operative as against a corporation, although the sale of intoxicating liquors is a mere incident of the general objects and purposes of the club." See note to this case in 38 L. R. A. (N. S.) 101.

In our view the decided weight of authority and the better reasoning, as shown by the cases above cited and reviewed, are that such transactions as we are discussing, notwithstanding some of the text books to the contrary, constitute SALES of intoxicating liquors within the meaning of the license laws, many of the statutes construed being not nearly so plain and unambiguous as our own statute.

The decisions of the Federal courts construing the internal revenue laws should be a determining factor in this case. These courts, without exception so far

as we are advised, hold that such transactions as we are considering in this case constitute the club or persons so dispensing liquors *retail liquor* dealers within the meaning of those laws and subject to the license tax therein prescribed. These courts brush aside with scant courtesy the subterfuges and specious pleas that such transactions do not constitute sales. See

U. S. v. *Wittig,* 28 Fed. Cases 744;
U. S. v. *Giller,* 54 Fed. 656;
U. S. v. *Alexis Club,* 98 Fed. 725;
U. S. v. *Woods,* Fed. Cases No. 16759;
U. S. v. *Roliger,* Fed. Cases No. 16190.

It should be noted that the first three cases cited are from courts sitting in states in which the state courts have held such clubs and associations not subject to the license laws of the state, that of Judge Lovell in *U. S.* v. *Wittig,* sitting in the District Court of Massachusetts, that of Judge Philips, sitting in the Western District of Missouri, in *U. S.* v. *Giller,* and that of Judge McPherson, sitting in the Eastern District of Pennsylvania in the case of the *U. S.* v. *Alexis Club.*

In *U. S.* v. *Rolliger, supra,* a number of persons united themselves together into a voluntary association for the purpose of providing themselves with whiskey and beer as they wanted it, charging a membership fee out of which the first stock of liquors were purchased. This liquor was furnished to members at a price fixed by a committee and the funds arising therefrom were used in replenishing the stock of liquors and in the payment of expenses. No profits were made.

"The Court (Treat, District Judge) instructed the jury that under the facts, as stated, each member of the association was liable for carrying on business as retail liquor dealer without paying the special tax, and the fact that the business was being carried on without any attempt to make a profit out of it made no difference, and as the law requires those who sell or offer for sale malt or spirituous liquors, shall pay the special tax, without reference to whether the selling or offering for sale is done for the sake of profit or not; and the fact that none but members of the association were allowed to partake of the liquor made no difference. The association was a partnership, in which all the members seem to have been equal partners, and liquors, when purchased in bulk, belonged to the partnership; but when the individual partner went to the clerk of the concern, and obtained from him a drink of the partnership liquor, and paid the clerk for that drink at the price fixed, that was a purchase of so much liquor from the partnership, and it was a sale of so much liquor by the partnership to this individual partner, and for so carrying on business the partnership should have paid a special tax as retail liquor dealers, and having failed and refused to do so, each member of the partnership became liable to the criminal provision of the law."

In *United States* v. *Wittig, supra,* the essential facts are identical with the case at bar. The court says:

"There seems to be no doubt that the club sells beer to its members. Every element of a sale is present; the delivery of the beer on the one part, and the payment on the other. It was argued that at common law a man can not buy of himself and others. This is a mistake. The common law recognizes such a sale, though, if the con-

tract is executory, the common law has no mode of enforcing it." * * *

"If I am right in saying that the beer is sold by the club to its members, the club is within section 18 (Sec. 3244 R. S.) above referred to, and the question is whether the generality of these words is to be restricted by a consideration of the subject matter, or by the words of Section 16 (3242 R. S.) which speaks of the same persons as dealers and as 'those who shall carry on the business', etc." If the question were merely whether the club carries on the business of beer selling there would seem to be great doubt; but Section 18 appears to be intended to define such dealers with as much exactness as may be, and, if so, the ordinary definition of dealers, or persons carrying on a business is of no importance."

"This is a revenue law, and the decisions of the Supreme Court require us to construe it liberally in favor of the revenue, to prevent evasions. So construed, I think, I think it must be held that any course of selling, though to a restricted class of persons and without a view to profit, is within its meaning."

Applying the same reasoning to section 2577 of the Compiled Laws of Alaska, we may say that said section having defined a *barroom* and required a license therefor, the ordinary definition of barroom or of persons engaged in the business of selling liquor at retail is of no importance. The statute settles that matter beyond cavil.

These decisions are, we think, controlling in this jurisdiction in the construction of said license statute.

Again, counsel for appellants argued in the court below that the said Alaskan statute in reference to licensing the sale of intoxicating liquors applied to

those only who *engaged in the business* of selling intoxicating liquors in a commercial sense, the purpose being to argue their case into a position within the reasoning of the decisions holding that statutes so providing do not apply to social clubs. The weakness of counsels' argument lies in the fact that the Alaskan statute does not admit of such a construction. Said section 2571 does not say that "no person, corporation, or company shall *engage in the business of selling*", etc., but, on the contrary, it says "no person, corporation or company shall *sell*", etc. *One* sale is an infraction of said statute, and the statute is indifferent as to the purpose of the sale. It may be for pleasure, convenience or sociability. So long as it is a *sale,* under the usual definition of that word, it is prohibited by the statute.

Section 2577 of the Alaska statute makes every place where intoxicating liquor is sold in quantities less than five gallons, to be drunk on the premises, a *"barroom"* and the license therefor a *barroom* license, and prescribes that every barroom, or other place where intoxicating liquors are sold at retail, must have a *retail* or *barroom license.* The only requirement of this language is that the amount sold shall be less than five gallons and that it shall be drunk on the premises, in other words a sale *at retail;* nothing is required as to the nature or purpose of the sale; there is no expressed or implied limitation of such a sale to sales made pursuant to *"engaging in the business of selling"* or to sales made by *"dealers"* in intoxicating liquors; neither is there anything to in-

dicate that Congress intended to restrict the sale or sales of intoxicating liquors to any *one* class of sales, but on the contrary the "sale" is left unlimited in its scope, applying to and comprehending sales of every class and description usually comprehended by that term.

The language of Judge McPherson in *U. S.* v. *Alexis Club,* 98 F. 725-726, in construing section 3244, R. S., is pertinent here:

> "The question has usually arisen upon the construction of a law licensing the sale of intoxicating drink, and the decisions that declare the transaction not to be a sale have naturally and properly been much influenced by the language of the particular law, and also by the fact that such a statute is generally—perhaps always—a penal statute which punishes a violation of its provisions by fine and imprisonment, and is, therefore, to be construed strictly in favor of the accused. When such a statute speaks of a 'dealer', or a 'dramshop keeper', or of 'selling by retail', or of 'the business of selling', without defining these terms, the task of definition falls upon the trial court, and there may then be little difficulty in concluding that a social club does not 'deal' in liquors, or is not engaged in the 'business' of selling within the common meaning of the words." * * *
>
> "But section 3244 of the Revised Statutes differs in an important particular from the statutes that were construed in these cases, and in some others that were cited upon the defendant's brief. This section declares expressly what is meant by a 'retail' dealer, and necessarily implies what is meant by a 'sale'. Every person is a retail dealer 'who sells or offers for sale foreign or domestic distilled spirits or wines in less quantities than

> five wine gallons at the same time'. Nothing is said about selling as a business, or selling as an innkeeper; nor is there any other limitation of the words 'sells or offers for sale' than the single limitation concerning the quantity to be sold at one time. In the face of language so clear, there is no room for construction. In my opinion, the plain meaning is that a single sale of spirits or wines, by any person, in a smaller quantity than five wine gallons, constitutes the seller a retail dealer in liquors, and makes him liable to pay to the United States a special tax of $25.00."

Again, it will be noted that paragraph XIII of the amended complaint, alleges that "said club has at all times paid the United States internal revenue tax or license required for the retail sale of intoxicating liquors", which allegation is an admitted fact in this case.

What constitutes a *retail liquor* dealer under the United States internal revenue laws? Section 3244, R. S., sub. 4, defines a *retail dealer* as follows: "Every person who sells, or offers for sale foreign or domestic distilled spirits or wines, in less quantities than five wine gallons at the same time, shall be regarded as a retail dealer in liquors." The payment by the defendant of this tax is an admission that they are *retail dealers* in liquors as defined by said statute, that is that they *"sell or offer for sale foreign* or *domestic* spirits," etc., in less quantities than five wine gallons at a time. In the face of this admission, can appellants now be heard to say that they do not sell intoxicating liquors? Upon what other theory are they paying $25.00 per annum to the United States as

retail liquor dealers? Section 2577 of the compiled laws of Alaska, *inter alia,* provides "That every place where distilled, malt, or fermented wines, liquors, or cordials are sold in quantities as prescribed for retail dealers by section 3244, Revised Statutes of the United States, to be drunk upon the premises, shall be regarded as a barroom; and the possession of malt, distilled, fermented, or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this act, and the license therefor shall be known as a barroom license."

Under the foregoing statute any place where intoxicating liquor is *sold* in less quantities than five gallons, to be drunk on the premises, *is a barroom,* and a *barroom license* is required therefor, and under said section 3244, R. S., any place where intoxicating liquors are sold in less quantities than five gallons is a retailer and a retail license is required therefor. Hence the same facts which would constitute appellants *retail dealers* under said section 3244 R. S., would make them *barroom keepers* as defined by said section 2577, Compiled Laws of Alaska. The determining factor common to each case is the sale of intoxicating liquors in quantities less than five gallons. And since neither statute *defines* a *sale* thereunder, the usual definition must obtain in each case.

Now, if the manner of dispensing liquor set out in the amended complaint constitutes a *sale* thereof under the internal revenue laws (Section 3244 R. S.), then

such transaction constitutes a *sale* under the Alaska law. Appellants are in the anomalous position of *admitting* the one but *denying* the other. It means only $25.00 tax per annum in the one case, but it means $1000.00 per annum in the other. Hence the reason for appellants' inconsistent position in this case.

Permit us to conclude that such transactions constitute a sale, and to close this branch of the argument by quoting a pertinent paragraph from Judge McPherson's opinion in *United States* v. *Alexis Club,* 98 Fed. 725, in which he holds that such transactions constitute sales:

> "If the result I have reached is correct, I believe it to be in the line of enforcing equality before the law; and equality before the law is a principle of American society, than which there is none more vital. Privilege and privileged classes are, and ought to be, intolerable; and it comes irritatingly near to a privilege where social clubs offering advantages of comfort and luxury that are only within the reach of the more prosperous, escape a share of the public burdens, because a refined reasoning declares that they are doing no more than distributing a common stock of liquors among their members, while the robust sense of the community, not excluding the club members themselves, know the transaction to be a sale."

SECOND QUESTION INVOLVED.

IF SUCH TRANSACTIONS DO CONSTITUTE *SALES,* THEN, DO SUCH *SALES* BY SAID "ENI" CLUB WITHOUT FIRST HAVING SECURED A BARROOM LICENSE CONSTITUTE A VIOLATION OF SECTION 2581 OF THE COMPILED LAWS OF THE TERRITORY OF ALASKA?

We are of the opinion that, aside from the decisions cited, there are two other things that are absolutely controlling in this jurisdiction in the construction of this license law, FIRST, the language of the law itself, which precludes any other construction than that such sales are in violation thereof; SECOND, the construction by the courts of a similar statute from which the Alaska statute was taken prior to the enactment of our Alaska statute.

Of these in order:

FIRST: The language of the statute (see Sec. 2571, Comp. Laws) is *"That no person, corporation, or company, shall sell, offer for sale, or keep for sale, traffic in, barter, or exchange for goods * * * any intoxicating liquors",* etc. Now, the term "person" in law is almost universally held to include corporations, partnerships and associations, but to remove all doubt or question, Congress added the words "corporation or company". The word "company" in a statute has often been held to mean and include corporations, partnerships, and voluntary associations of individuals of all or any kind. See the cases cited in

"Words and Phrases", Vol. 2, p. 1347, under the head "Company". There can be no reasonable doubt but that the word "company", as used in this Act, was meant to and does include all voluntary associations of individuals.

Again, the statute (Sec. 2577, Comp. Laws) says that "a retail or barroom license shall be required for every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail". And again, "That every *place* where * * * liquors are sold * * * *to be drunk upon the premises, shall be regarded as a barroom",* and further that the possession of liquors "with the means and the appliances for carrying on the business of dispensing the same *to be drunk where sold, shall be prima facie evidence of a barroom* within the meaning of the Act, and *the license therefor shall be known as a barroom license".*

The language of this Act is so plain that we can hardly assume that any one in good faith will contend that an association of individuals may purchase liquors, prepare a place for dispensing the same to be drunk upon the premises, and charge *the individual* ordering the same a price practically equal to that charged by the admitted and confessed barrooms of the city, without being subject to the license laws of the Territory, but such is the position taken by counsel for the appellants.

They argue that only those persons, corporations and companies who are required to have a license by the sections preceding Section 2581 are prohibited by

said last named section to sell intoxicating liquors without a license. However, the fallacy lies in their assumption that the preceding sections *do not require* all persons, corporations and companies to have a license. When the statute (Section 2571 says *"No person, corporation or company,"* shall sell, offer for sale, or keep for sale, traffic in, barter or exchange for goods in said District of Alaska, any intoxicating liquor, except as hereinafter provided, the prohibition is universal, and the inhibition is placed upon every individual and conceivable combination of individuals, and the only possible avenue of escape therefrom by appellants is *through the exception clause.* Does the exception clause—*"except as hereinafter provided",* cover a combination of individuals such as the "Eni" Club? What exceptions are thereinafter provided by the statute? Just three classes, viz.: (1) Druggists and apothecaries; (2) sales under provisions of law, such as Marshal's sales, administrator's sales, etc., and (3) sales by those who have applied for and secured a license to sell.

It can not be claimed by the appellants that their club comes within either the first or second classes excepted from the prohibition. It follows, therefore, that appellants' club must come under the third exception, to wit, the provision providing for the application for and securing of a license, or it is absolutely prohibited from selling at all.

However, in our opinion, the words of said statute: "No person, corporation or company shall sell", etc., "except as hereinafter provided" should be construed

to mean the same as if it read, "Any person, corporation or company may sell etc., upon a compliance with the following provisions and not otherwise." In other words, the statute means that no person, corporation or company prohibited absolutely from selling intoxicating liquors but only conditionally, that is, the prohibition applies until such person, corporation or company applies for and secures a license in accordance with the provisions of the statute following the provision, *"except as hereinafter provided",* above referred to. Hence, appellants' club is forbidden to sell intoxicating liquors until it applies for and secures a license. The statute contemplates that every person, corporation or company shall apply for or secure a license before such person, corporation or company is allowed to sell. It says in plain and simple language that no person, corporation or company shall sell until it has complied with the provision requiring a license.

Our contention is that Section 2581 is as broad as Section 2571; that every one who is forbidden to sell without a license by Section 2571 is subjected to a penalty as prescribed by Section 2581. Any other construction of Section 2581 would destroy the partial effect of Section 2571. The evident intent of Section 2581 is that "any person (except druggists and apothecaries and persons making sales under provisions of law requiring them to sell personal property) who shall sell intoxicating liquors, without first having obtained a license so to do, shall upon conviction thereof be fined etc." Said Section 2581 provides that

"Any one engaging in the sale of intoxicating liquors * * * , *who is required by it* (this act) *to have a* license as herein specified, without first having obtained a license to do so as herein provided, * * * upon conviction thereof shall be fined", etc. Now, the relative clause *"who is required by it to have a license as herein specified"* is either *explanatory* or *restrictive*; that is, it either expresses some attribute of its antecedent "anyone" or it restricts the application of such antecedent. The rule is that explanatory or appositive clauses should be set off by commas, while restrictive clauses should not be so set off. Applying, therefore, the rules of grammatical construction, the said clause is merely explanatory and is not intended to restrict the application of its antecedent to a *particular class of persons who sell liquor without a license.* Implying that there are other persons who sell without a license to whom it does not apply. Let me illustrate: If I say "Roman citizens, who are patriotic, should avenge the death of Caesar", and place the clause *"who are patriotic"* within commas, said clause is appository or explanatory and the sentence means that all Roman citizens are patriotic and should avenge the death of Caesar. But, on the other hand, if I use the same identical words but leave out the commas, the clause, "who are patriotic", is restrictive and limits its antecedent citizens to the patriotic class of Roman citizens, and implies that there is a class of Roman citizens who are not patriotic, and the sentence would mean merely that patriotic Roman citizens should avenge the death of Caesar. Again,

to use a parallel sentence, if I say: "Any pupil attending public school, who is required to reach the school building by nine o'clock, A. M., will be punished if tardy", and place the relative clause: *"Who is required to reach the school building by nine o'clock, A. M.",* within commas, said clause is appositive or explanatory, and the sentence means that every pupil attending public school is required to reach the school building by nine o'clock A. M., and will be punished if tardy. But, on the other hand, if I use the same identical words but leave out the commas, the clause: *"Who is required to reach the school building by nine o'clock A. M.",* is restrictive and limits its antecedent, "any pupil", to such pupils as are required to reach the school building by nine o'clock A. M., and implies that there are two classes of pupils attending school, *one* class which is required to reach the school building by nine o'clock A. M., and *another* class which is not so required.

Now, applying the same rule of grammatical construction to said Section 2581, the words: "Any one engaging, etc., who is required by it to have a license as herein provided", does not mean or imply that there are two classes of persons, *one* class which is required to have a license, and *another* class which is *not* required to have a license, that is, the relative clause *is not restrictive,* but, on the other hand, said words do mean that *every* one engaging, etc., is required to have a license, that is, the relative clause is explanatory, leaving its antecedent, *any one,* with its full, unrestricted, universal application.

There are other reasons why said Section 2581 should be construed to be as broad as said Section 2571. They are parts of the same Act and should be construed in the light of every other portion of the Act. A consideration of Section 2577 of the same Act will illumine the matter under consideration. Said Section 2577, *inter alia,* provides, "That a retailor barroom license shall be required of every hotel, tavern, boat, barroom, or *other place* in which intoxicating liquors are sold at retail". We are assuming in this part of our argument that the transactions by which members of appellants' club are furnished intoxicating liquors *constitute a sale,* having argued that matter under the first question presented in this brief. Assuming, therefore, that the transactions complained of by plaintiff constitute a *sale,* there can be no question that they constitute a sale *at retail,* and a retail or barroom license is required therefor by the above provisions of said Section 2577. The language of the section is that *"Every barroom or other place* where intoxicating liquors are sold at retail", must secure a barroom or retail license. If defendants' club is a *barroom,* the declaration is specific that it must have a license. If defendants' club is *any other place* where intoxicating liquors *are sold at retail,* the declaration is equally specific that it must have a license. But Congress has gone further in this same Section 2577, and has defined a *"barroom"* as *"every place where distilled, malt or fermented wines, liquors or cordials are sold in quantities as prescribed for retail dealers by section 3244 of the Revised Statutes of the*

United States, to be drunk upon the premises". Under this definition, appellants' club is unquestionably a *barroom;* but the said section goes another step further and makes the possession of such liquors with the appliances for drinking the same where sold *prima facie* evidence that such place is a *barroom.* Assuming that the transactions complained of constitute a sale, can any one doubt that the status of defendants' club is fixed by said Section 2577 as a *barroom?* Can any one mistake the meaning of this section when it says "That a retail or barroom license is required of every * * * barroom etc.?"

Since the appellants' club is a barroom and every barroom is required to have a license, it follows that appellants' club is required to have a license by said Section 2577. In fact, *every place* where intoxicating liquors are sold at retail must have a retail or barroom license, whether such sale is made by a person, a corporation or a company. The nature of the business determines whether or not the license is required, not the nature of the agency which makes the sale. Every place must secure a license whether it is an *aristocratic* club or a *democratic* saloon, both are *barrooms* in the eyes of the law.

Now, if every place where intoxicating liquors are sold at retail is required to have a license irrespective of who runs the place, it follows that *every one* is required to have a license before engaging in such sale. This is the irresistable conclusion from said Section 2577.

Reading said Section 2581 in the light of said Sec-

tion 2577, we would ask in the words of the explanatory clause of said Section 2581, "Who is required by it (the statute) to have a license as herein specified?" And the answer is "every one who sells at retail", which necessarily includes appellants' club. Hence, if appellants' club sells intoxicating liquors without first having secured a license so to do, being required by said Section 2577 to have a license, it is amenable to said Section 2581, and its *members, agents* and *officers* are guilty of a misdemeanor.

But counsel for appellants say that said Section 2581 applies only to persons, corporations and companies who are required by other provisions of the Act to have a license, and that since voluntary associations, or social clubs, are not expressly mentioned, *eo nomine*, by the statute, their club is not required to have a license. In other words, they assert that said Section 2581 contemplates at least two classes to sell intoxicating liquors without a license, those who are required by the terms of the Act to have a license, and those who are not so required, and that it is only the first of these classes who can be *punished*.

What is the chief argument in support of such a construction? It is that the form of a petition for a license, prescribed by Section 2574, for a person is not adapted to the use of appellants' club; that the requirements that the applicant shall state in such petition that he will conduct the business himself and not as agent for another person, and that he will superintend in person the management of the business, and perhaps some others, are statements that appellants'

club, having no legal entity, could not make. But the same objection could be advanced on behalf of any corporation, copartnership or aggregation of persons. The form of the petition prescribed by the statute is adapted only for the application of a single person, *but does it follow that it can not be modified in form to meet the requirements of other classes of applicants?* If corporations, or companies, could not under said Section 2574 apply for licenses, we can hardly divine the purpose of embodying them in Section 2571 wherein they are prohibited from selling intoxicating liquors *except as in said act hereinafter provided.*

No corporation can take an oath or superintend or conduct a business personally. Its very nature precludes it from acting except by its officers and agents; a partnership or other aggregation of persons could do no more. They must act as individuals or by their agents and not otherwise. Are we to advise this Court, therefore, that neither a corporation nor copartnership is required by our license laws to apply for and secure a license before engaging in the sale of intoxicating liquors?

The contrary has been the practice of the District Court. Corporations and copartnerships have always applied for and secured licenses to sell intoxicating liquors under said Section 2574, notwithstanding the inadaptability of the prescribed form of petition to the nature of such corporation or copartnership. At the present time there are three copartnerships and one corporation here in Nome which are licensed to sell intoxicating liquors at retail, namely, Statie & Hill,

Caldwell & Wettergren, and Young & Van Sickle, copartnerships, and the Seward Commercial Company, a corporation, said last corporation holding a wholesale license also. We submit that when an officer of the corporation or a member of a copartnership makes and files a petition on behalf of his corporation or copartnership complying with the prescribed form of petition to the extent that the nature of the applicant will permit, that the same is all that is contemplated by said Section 2574. And such has been the uniform holding of this court as is evidenced by the licenses now issued to corporations and copartnerships.

Let us trace counsel's contention to its final analysis. What would it mean for this court to hold that appellants' club (an aggregation of individuals) cannot apply for and secure a license to sell intoxicating liquors because the form of application prescribed by statute for a *person* is not adapted for the application of any other class of applicants and for that reason could sell without such license? It would mean that the Seward Commercial Company, a corporation which is now paying to the Clerk of the District Court for both wholesale and retail liquor license annually the sum of $3000.00, would never pay another cent; it would mean that Stadie & Hill, Caldwell & Wettergren, and Young & Van Sickle, who are now each paying the sum of one thousand dollars annually to the Clerk of this Court, would find other use for their money; but each and all of them would continue to do business at the old stand without fear of molestation

from the collector of license fees, or of prosecutions by the United States Attorney.

And this is not the whole of the result of such a ruling. Every saloon man in this Division would immediately form either a corporation or a copartnership, and thereby exempt himself from the license requirements of the statute. Why should they pay a large annual license fee to the Government, if corporations and companies can engage in the same business free?

Counsel's argument reduces itself to an absurdity, for it is certainly absurd to argue that it was the intention of Congress in enacting a revenue law to provide so patent an opening for the complete evasion and nullification thereof.

SECOND: The construction by the courts of a similar statute from which our license law was presumably taken before our license law was enacted.

It is a familiar rule of construction that the adoption of a law previously adopted by another State or jurisdiction adopts also the construction put upon that law by the courts of such other State or jurisdiction.

The Alaska license law was passed by Congress in 1899, 30 Statutes at Large 1337-1341. The sections and paragraphs we are construing were taken presumably from "An Act regulating the sale of intoxicating liquors in the District of Columbia", passed by Congress March 3, 1893. (See 27 St. at L., p. 563.) A comparison of Sections 1, 8 and 12 of said Act with Sections 2571, 2577 and 2581 of the Compiled Laws of Alaska, shows that the paragraphs we are construing were adopted from the said District of Columbia

Act. Section 2571 of the Alaska Act is identical with Section 1 of the District of Columbia Act, *except* that in the Alaska Act the words "corporation or company" are inserted after the word "person", and "District of Alaska" is substituted for District of Columbia, and the provision relating to brewers and distillers is omitted from the Alaska law. The parts of Section 2577 of the Alaska Act above quoted are taken word for word from Section 8 of the District of Columbia Act.

Now, prior to the passage by Congress of the Alaska Act applying the District of Columbia Act to the District of Alaska, the highest court on the District of Columbia had construed said act in its application to clubs. In *Army and Navy Club* v. *District of Columbia,* the Court of Appeals of the District of Columbia held that the said license law was applicable to said club. The case was decided in 1896. In this case it was held that a social club, incorporated with a limited membership, or organized for the maintenance of a library and for social purposes, which dispenses wines and liquors to its members according to a tariff of rates sufficient to replenish the stock and provide for the necessary expenses of the club, but not sufficient to pay any profit to its members, was a *barroom subject to the license fee.*

In arriving at such conclusion, said Court considers the nature of the transactions involved in distributing liquors to its members by the said club, and says: *"Here we find all the elements of a legal sale",* reserving its opinion, however, in cases of *unincorporated* clubs. It was claimed in that case by the club that the

only license issued where liquors were sold in small quantities (retail) is a *"barroom"* license, and that such club should not be considered a barroom in the ordinary sense. The Court says: "Were the word 'barroom' used in that sense there might be something in the contention; for clearly the club can not be said to be the proprietor of a barroom in the sense that the word is ordinarily used. *But we are saved trouble on this point by the definition given in* the following clause of section 5." The Court then quotes the definition of a barroom found in Sections 5 and 8 of said act, the latter of which is found verbatim in Section 2577, Compiled Laws of Alaska, to wit:

> "That every place where distilled, malt or fermented wines, liquors or cordials are sold in quantities as prescribed for retail dealers by section 3244 R. S. to be drunk on the premises shall be regarded as a barroom; and the possession of malt, distilled, fermented or any other intoxicating liquors, with the means and appliances for carrying on the business of dispensing the same to be drunk where sold, shall be *prima facie* evidence of a barroom within the meaning of this act"
> * * *
>
> "That clubs which dispensed liquors to members were to be considered barrooms in the stautory sense aforesaid, and as such *within the two foregoing provisions,* unless specially excepted, is made plain by the following provisions attached to section 6:
>
> " 'Provided further that the said excise board may in its discretion issue a license to any duly incorporated club on the petition of the officers of the club, and that said excise board may in its discretion grant a permit to such club to sell intoxicating liquors to members and guests between such

hours as the board aforesaid may designate in said permit.' "

What was the purpose of this *proviso?* Evidently not to extend the act so that its terms would include incorporated social clubs (for the word "person" used in Section 1 of the Act is sufficiently broad to include all corporations), but to *increase* the authority and power of the excise board in dealing with such clubs. By this proviso it was made *purely a discretionary matter* with the excise board whether a license to sell intoxicating liquors to members and guests should be granted to incorporated clubs under any circumstances. The excise board had no such discretionary power in reference to other applicants.

Again, said provision augmented the power of the excise board in reference to the hours during which liquor could be sold by a social club, by vesting in such board the power to determine, *in their discretion,* during what hours such club could sell, said Section 6 providing that "every barroom and other place where intoxicating liquors are sold" shall be closed and no intoxicating liquors sold from 12 o'clock midnight to 4 o'clock in the morning and on Sundays. This provision of the Act, applicable to all, was by said proviso modified so that incorporated clubs were *conditionally* excepted therefrom, that is, the excise board might, in their discretion, except them therefrom, or still further limit or restrict the hours in which such club could sell. Hense the purpose and effect of mentioning incorporated clubs in said proviso to said Sec-

tion 6 was not, as argued by counsel for appellants in court below, to extend such license law to such clubs, but to vest greater power in the excise board in dealing with them than such board had in dealing with other applicants, showing unmistakably that Congress considered the general prohibitions and provisions of said statute to include such clubs and *conditionally excepted them therefrom by said proviso.* Hense the force of Judge Shepherd's conclusion in the following language:

> "If good reason exists why *bona fide* social clubs of the character and standing of the appellant should be exempt from the payment of license taxes, because their incidental dispensation of liquors to their members is without profit and unattended by some of the evil influences of the public barroom, they are for the consideration of Congress. We must declare the law as it is written."

Note that this decision was rendered in 1896, while Congress did not adopt and apply this Act to the District of Alaska until 1899. Now, following the canon of statutory construction above stated, it must be conclusively presumed that Congress in applying said Act to the District of Alaska adopted the construction given to it by the highest court of the District of Columbia. In other words, a social club which sells intoxicating liquors to its members in quantities less than five gallons as a tonic, to be drunk upon the premises, is conducting a *"barroom"* as defined by Section 2577, Compiled Laws of Alaska, and as such is required to procure a retail or barroom license as defined by said

section, and such was the intention of Congress when such section was enacted. But apparently to remove all question, Congress inserted the words "corporation or company" after the word "person" in said District of Columbia Act, in applying said Act to the District of Alaska.

Counsel for appellants made two contentions in the lower court which we desire to notice briefly together. First, they contended that Section 2571, Compiled Laws of Alaska, contains no penalty within itself, *which we concede.* Second, they contend that Section 2581, Compiled Laws of Alaska, prescribing the penalty, is not broad enough to include their club, *which we do not concede,* but have hereinabove considered. Assuming, however, for this argument that counsel are right in both contentions, does their conclusion follow, viz., that there being no penalty prescribed by the act, itself for its violation, the prohibitions contained in said Section 2571 are ineffective and said section is abortive in so far as their club is concerned?

The common law, both civil and criminal, is in force in this Territory so far as not inconsistent with the constitution of the United States and acts of Congress. Compiled Laws of Alaska, Sections 796 and 2096. Said Section 2096 provides:

> "The common law of England as adopted and understood in the United States shall be in force in said District, except as modified by this act."

It was a well settled principle at common law that "In every case where a statute prohibits anything and

does not limit a penalty, the party offending therein may be indicted as for a contempt against the statute."

State v. *Gaunt,* 13 Oregon 115, 120;
Bishop on Criminal Law (7th ed.), pars. 237, 239.

Hence it is necessary for a statute to prescribe a penalty for the violation except in jurisdictions in which the common law is not in force; and therefore counsel's argument fails and the prohibitions contained in said Section 2571 are effective against appellants' club irrespective of the construction placed upon said Section 2581.

Upon consideration of the whole matter, we are of the opinion that the question is not in doubt; that such clubs as we are considering are clearly subject to the license laws of the Territory, and consequently all members of the club are liable to prosecution and to loss of reputation and property interest if the appellants are not restrained from further violation of the law. Hence, the action of the District Court overruling the demurrer to the amended complaint and the entering of a decree thereon should be affirmed.

Respectfully submitted,

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District of Alaska, on behalf of
United States as *Amicus Curiae.*